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C.R.P(NPD)(MD).No.305 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 12.06.2023

Pronounced on : 11.08.2023

CORAM:

THE HONOURABLE MR.JUSTICE P.VADAMALAI

C.R.P(NPD)(MD)No.305 of 2018

and

C.M.P(MD)No.1417 of 2018

K.Murugan

...Petitioner/Plaintiff

Vs.

K.Sudalaimuthu

... Respondent/Defendant

PRAYER : Civil Revision Petition filed under Section 115 of the Civil Procedure Code, to set aside the fair and decreetal order passed in I.A.No.272 of 2015 in O.S.No.101 of 2007 dated 05.07.2017 on the file of the Principal Sub Court, Tirunelveli by allowing this Civil Revision Petition.

For Petitioner : Mr.H.Arumugam

For Respondent : Mr.R.Ponkarthikeyan

ORDER

This Civil Revision Petition is filed against the fair order and decreetal order dated 05.07.2017 passed in I.A.No.272 of 2015 in O.S.No.101 of 2007 on the file of the Principal Sub Court, Tirunelveli.



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2. The brief facts of the case:

The revision petitioner is the plaintiff in O.S.No.101 of 2007 on the file of the Principal Sub Court, Tirunelveli. The main suit is filed against the respondent for partition of his 3/4th share. The respondent, who is the defendant, appeared through counsel and failed to file written statement and remained ex-parte. In the suit, preliminary decree and final decree were passed. In pursuance of final decree, execution petition was filed and the property was taken delivery by the petitioner/plaintiff. At this stage, the respondent filed the petition under Section 5 of the Limitation Act, to condone the delay of 1761 days in filing the petition to set aside the ex-parte final decree passed in O.S.No.101 of 2007. The petition was resisted by the revision petitioner by filing a detailed counter. After hearing both, the Trial Court has allowed the petition on 05.07.2017. Aggrieved by the said order, the revision petitioner/plaintiff has preferred this Civil Revision Petition.

3. Heard both side and perused the records in this Civil Revision Petition.

4. The learned counsel appearing for the revision petitioner has argued that the revision petitioner filed the suit in O.S.No.101 of 2007 on



the file of the Principal Sub Court, Tirunelveli against the respondent for partition. The respondent is the brother of the revision petitioner. The respondent remained ex-parte and ex-parte preliminary decree was passed on 11.02.2008. Thereafter, the petitioner has filed the petition for final decree. Though notice was served, the respondent did not appear and remained ex-parte. Then the Commissioner was appointed and he filed a report. Upon the Commissioner's report, the final decree was passed on 13.08.2010. Thereafter, the petitioner filed the Execution Petition in E.P.No.56 of 2011 and delivery was ordered and the suit property was delivered to the petitioner through Court proceedings. Thereafter, the Execution Petition was terminated on 01.11.2011. The revision petitioner executed the settlement deed in favour of his wife and son and revenue records were also transferred in their name. Now, the respondent has filed the petition to condone the delay of 2645 days in filing the petition to set aside the ex-parte preliminary decree. After final decree is passed, the respondent has to prefer an appeal against the final decree. The respondent has not taken any steps against the final decree and subsequent orders passed in the execution proceedings. The respondent has not assigned any valid reason to substantiate such huge delay. The ground of the Trial Court that as per the Commissioner's report the agricultural property is indivisible is not acceptable one and



hence, the delay condone petition was to be allowed. After 7 ½ years, the respondent has filed the petition to condone the delay in filing the petition to set aside the ex-parte decree. After final decree passed, the petitioner has filed the execution petition, obtained delivery through Court and the execution proceedings were terminated and hence, the delay to set aside the ex-parte decree could not be condoned. The respondent who remained ex-parte in all proceedings upto delivery of property, now has filed the present petition without any valid reason. The Trial Court has not taken into consideration all these facts. The Trial Court has gone to the extent while discussing the petition filed under Section 5 of the Limitation Act that the property is being vacant land could be easily partitioned, which is unsustainable. The Trial Court has to consider whether the delay of 2645 days have been properly explained by the respondent. The Limitation Act was not enacted with the object of destroying the rights of the parties, but to ensure that they approach the Court for vindication of their rights without unreasonable delay. The idea underlying the concept of limitation is that every remedy should remain alive only till the expiry of the period fixed by the legislature. In support of his arguments, the learned counsel for the revision petitioner has relied on the following citations:



1. **(2009) 7 MLJ 746 (Muthusaamy vs. Subramanian)**, wherein

this Court held the Ratio Decidendi as follows:

“Delay in seeking to set aside the ex-parte decree cannot be set aside after delivery of possession is taken and execution proceedings are terminated, when sufficient cause is not shown, since settled matter cannot be re-opened to upset the apple cart.”

2. **2006 (5) CTC 822 (Kaliammal and Ors. vs. Sundharammal**

and Anr.), wherein it is held in paragraph No.19 as follows:

“As noted earlier, Final Decree has been passed and in the E.P., delivery of possession was also ordered on 5.7.2002. If I.A.No.11/1995 is to be allowed at this stage, it would unsettle the various proceedings of the Court. Interest of justice and enquiry requires that there must be an end to the litigation. Or otherwise, the right accrued to the opposite party would be unsettled by the uncertainties of the litigation.”

3. **(2012) 12 Supreme Court Cases 693 (B.Madhuri Goud vs.**

B.Damodar Reddy), wherein it is held in paragraph No.10 as follows:

“10. In Maniben Devraj Shah /v/ Municipal Corpn. of Brihan Mumbai, this Court referred to some of the judicial precedents and observed : (SCC pp. 168-69, paras 23-24)

24. What colour the expression “sufficient cause” would get in the factual matrix of a given



case would largely depend on bona fide nature of the explanation. If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay.”

4. 2015(1) CTC 73 (K.Vijayalakshmi & Ors. Vs. K.Sashikanth),

wherein it is held in paragraph No.18 as follows:

“18. Section 97 of the Code of Civil Procedure provides that in case a party to the partition suit fails to challenge the preliminary decree, he would be precluded from disputing its correctness in appeal, which may be preferred from the final decree. Therefore, it is clear that the rights of the parties are crystalised and conclusively determined by the preliminary decree.”

5. Per contra, the learned counsel for the respondent has vehemently contended that the respondent is an illiterate and taking advantage of his illiteracy the petitioner obtained suit and execution proceedings in his favour. The huge days delay is not a matter. As per the Commissioner’s report, the "B" schedule property, which is a larger extent of 54 cents is indivisible is not acceptable. The Trial Court has



correctly observed that the said report is not acceptable. The respondent is ready to compensate the delay or inconvenience caused to the petitioner, in case this Court remand back for fresh enquiry.

6. In reply, the learned counsel for the revision petitioner submitted that once the matter was settled by terminating execution proceedings, the same could not be reopened and the respondent failed to prefer the appeal against the final decree. So, the impugned order of the trial Court has to be set aside.

7. On perusal of records and on hearing both it is clear that the revision petitioner, who is the plaintiff in O.S.No.101 of 2007 on the file of the Principal Sub Court, Tirunelveli, filed the suit for partition against the respondent seeking 3/4th share in the suit property. The respondent is the sole defendant and remained ex-parte. Accordingly, preliminary decree was passed, then petition for final decree was filed and the Commissioner was appointed, who filed a report and based on the Commissioner's report final decree was also passed. Subsequently, the revision petitioner filed the Execution Petition and took possession towards his share and execution proceedings were terminated. There is no dispute in it. The respondent now wants to set aside the ex-parte



preliminary decree and ex-parte final decree on the ground that he is an illiterate.

8. The Trial Court has set aside the ex-parte decree on the ground that as per the Commissioner's report, the "B" schedule property measuring 54 cents is indivisible is not accepted. On the side of the revision petitioner the dates and events of this case on hand has been produced. On perusal of the same, it is clear that the main suit in O.S.No.101 of 2007 was filed on 02.07.2007 and summon was served on respondent on 26.08.2007 and appeared through counsel on 07.09.2007. The respondent was set ex-parte on 04.01.2008 and the preliminary decree was passed on 11.02.2008. In the final decree petition, the respondent set ex-parte on 05.11.2008 and Advocate Commissioner was appointed. The Advocate commissioner sent notice to the respondent on 06.04.2009 intimating his inspection of the suit property on 11.04.2009. The final decree was passed on 13.08.2010. In executing proceedings, delivery was ordered and effected on 01.11.2011 and after recording delivery, the executing proceedings were terminated. Therefore, the suit reached its finality.



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9. At this stage, the respondent filed petitions to condone the delay of 2645 days in filing petition to set aside the preliminary decree and to condone the delay of 1761 days in filing petition to set aside final decree. On perusal of records, it is clear that the respondent was examined as P.W.1, who admitted that he heard about the delivery of property by Court amin and execution proceedings were terminated. On perusal of records, the amin was examined as P.W.2, who deposed that he tried to serve the E.P notice but, the respondent refused to sign the notice. On perusal of decretal clauses in final decree, it is clear that since the revision petitioner and the respondent are living adjacent to respective houses the same were allotted to them. In respect of the "B" schedule property, considering the value of two properties and considering the value of the shares of the parties, the Trial Court allotted the "B" schedule to the revision petitioner and directing the respondent to pay owelty to the revision petitioner as the respondent's share house fetched more value than his 1/4th share. From this, it is clear that the respondent is living adjacent to the revision petitioner. If so, the revision respondent could not claim that as he is an illiterate and the revision petitioner obtained orders taking advantage of illiteracy.



10. It is a settled principle, after execution proceeding was initiated and the same was terminated, the case could not be reopened. When a party is thoroughly negligent in prosecuting his case, then it would be a legitimate exercise of discretion not to condone the delay. The petition to condone the delay of 2645 days i.e., more than 7 ½ years in filing the petition for setting aside the ex-parte judgment. In such circumstance, the respondent has to establish the said delay of 2645 days. It is a settled provision that each and every days delay has to be explained and in each and every case has to be decided upon the facts and circumstance of the case concerned. The respondent has not stated any valid reason except he is an illiterate. Admittedly, the revision petitioner and the respondent are brothers and there was a battle between them over their common properties. If so even a layman might have been vigilant on his case. The law will help the party to the suit, who is vigilant on the case proceedings. The litigants are always expected to be vigilant over their rights and liabilities, duties and responsibilities and any litigant, who slept over their right, has to necessary loose their right on account of efflux of time. Any litigant, who slept over his/her right, cannot wake up on fine morning and knock the doors of the Court for redressal of his/her grievance. It is practice in case proceedings the delay caused as if the party was in ailment and illiterate, however, the same should be established by



producing acceptable material. In the case on hand the delay is an inordinate delay and the reason assigned by the revision petitioner is not convincing.

11. The condonation of delay is a remedy and not a right to the aggrieved party even if the party provide sufficient cause. The cases relied on by the revision petitioner will be applicable to the facts of this case, as the dispute between the party is only for partition of their property and the parties to the proceeding are residing in adjacent houses as per preliminary decree. So, the knowledge of Court proceedings must be known to the respondent. After kept silent for 7½ years, the respondent has filed the petition to condone the delay is not acceptable one. The Trial Court has not considered all these aspects and decretal clauses of final decree and has come to the wrong conclusion that the "B" schedule property is indivisible as stated by the Commissioner and so, it has allowed the petition, which is not correct in view of the above settled principle of law. Therefore, considering the above facts and circumstances, the impugned order of the Trial Court warrants interference and the same is liable to be set aside and thus, this Civil Revision Petition succeeds.



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12. In the result, this Civil Revision Petition is allowed. The fair order and decretal order dated 05.07.2017 passed in I.A.No.272 of 2015 in O.S.No.101 of 2007 on the file of the Principal Sub Court, Tirunelveli is set aside and the petition in I.A.No.272 of 2015 in O.S.No.101 of 2007 is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

11.08.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No

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To

- 1.The Principal Sub Court,
Tirunelveli.
- 2.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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P.VADAMALAI, J.

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Pre - Delivery Order made in
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